On July 25, 2001, McKinley stood trial in Mansfield Municipal Court on two counts of falsification and one count of obstructing official business.

On July 26, 2001, a jury convicted McKinley on all three counts. McKinley appealed the decision.

The prosecutor introduced both tapes into evidence through Lt. Fortney, who was a witness in the criminal trial.

On February 19, 2002, an arbitrator reversed McKinley's termination and converted the termination into a 120-day suspension, granting McKinley full back pay and benefits (minus the 120 days pay).

On June 25, 2002, the Richland County Court of Appeals reversed the judgment of the Mansfield Municipal Court in the criminal matter, holding that the trial court erred in permitting the use of McKinley's February 25, 2000 and March 7, 2000 statements at his criminal trial, and vacated the convictions. *State v. McKinley*, WL 1732136 (Ohio App. 5 Dist. June 25, 2002).

On November 27, 2002, McKinley filed a complaint in the district court asserting claims under 42 U.S.C. § 1983 and several common law causes of action. The complaint named as defendants the city of Mansfield, Ohio and certain of its police officials, including Lt. Fortney.

The lawsuit alleged a violation of McKinley's Fifth Amendment right to be free from self-incrimination by compelling him in the second interview to make incriminating statements as to falsification and obstruction, which statements were later used at his trial for those crimes.

The defendants filed a motion for summary judgment, which the district court granted (McKinley had also

alleged a violation of his Fourth Amendment rights; the district court granted summary judgment on that claim, the Sixth Circuit affirmed that holding and that issue is not on appeal to this Court). The Sixth Circuit reversed the district court on the Fifth Amendment claim, holding that there was a genuine issue of material fact as to whether McKinley's Fifth Amendment rights had been violated.

Petitioners filed a Motion for Panel Re-hearing or Re-hearing *En Banc* before the Sixth Circuit. The Sixth Circuit denied Petitioners' Petition for Panel Re-hearing or Re-hearing *En Banc* on July 19, 2005.

Petitioners appeal to this Court to grant a Writ of Certiorari based on two reasons; first, they claim that the Sixth Circuit decision contradicts *Garrity* and its progeny. Second, they claim that this issue is of national importance because the decision impacts the ability of municipal employers to hold their employees accountable for their official conduct, thus undermining public confidence in and the effective functioning of the government.

Neither of these assertions are true; the Sixth Circuit's decision is directly in line with *Garrity* and its progeny. Further, contrary to the Petitioners' assertion, the decision does not impact the ability of municipal employers to hold their employees accountable for their official conduct, but rather it holds municipal employers accountable for their conduct and should be permitted to stand. Lastly, because of the unusual fact pattern of this case, the Sixth Circuit decision affects a relatively small number of employers and employees.

ARGUMENTS

1. THE SIXTH CIRCUIT'S DECISION IS NOT CONTRARY TO PRIOR CASE LAW.

The Fifth Amendment, applied to the states through the Fourteenth Amendment, provides that a person shall not be "compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. It guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964). "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 38 L.Ed.2d 274, 94 S.Ct. 316 (1973).

In *Kastigar v. United States*, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), the U.S. Supreme Court declared that the Fifth Amendment's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction of [criminal penalties].'" *Id.* at 453 (quoting *Ullmann v. United States*, 350 U.S. 422, 428-39, 100 L.Ed. 511, 76 S.Ct. 497 (1956). The high court held that a statute granting use and derivative use immunity does not violate the Fifth Amendment because it "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.*

As the U.S. Supreme Court said in the landmark case of *Miranda v. Arizona*:

> . . . no distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word. . . .

Miranda v. Arizona, 384 U.S. 436, 476-77, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

The right to a *Miranda* warning of one's right to remain silent is more than a procedural safeguard.

> This warning is required as a procedural safeguard, but more importantly it expresses a substantive Constitutional right – the right to remain silent rather than answer incriminating questions posed by the police. It is wrong, therefore, to relegate this part of the advisement to the status of "only a prophylactic device": It is a prophylactic device, but it expresses a substantive right.

Cooper v. Dupnik, 963 F.2d 1220, 1239 (9th Cir. 1992).

A Section 1983 action may exist under the Fifth Amendment self-incrimination clause if coercion was applied to obtain a waiver of the plaintiff's rights against self-incrimination and/or to obtain inculpatory statements, if the statements thereby obtained were used against the plaintiffs in a criminal proceeding. *Weaver v. Brenner*, 40 F.3d 527, 535 (2d Cir. 1994). As the Ninth Circuit has said:

> Based on the foregoing, we conclude that Cooper adequately has stated a cause of action under Section 1983 for a violation in the sheriff's department of his clearly established Fifth Amendment right against self-incrimination. Barkman and his companions conspired not only to ignore Cooper's response to the advisement of rights pursuant to *Miranda*, but also to defy any assertion of the Constitution's Fifth Amendment substantive right to silence, and to grill Cooper until he confessed. Accepting the facts as they stand essentially uncontested in the record, Cooper's interrogators tried first to trick him into foregoing his right to silence by turning the *Miranda* advisement into a farce. The Supreme Court had this tactic in mind when it said:
>
> Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

Miranda v. Arizona, *supra* at 476, cited in *Cooper v. Dupnik*, 963 F.2d 1220, 1242-43 (9th Cir. 1992).

The Fifth Amendment right also encompasses the right to consult with an attorney and to have an attorney (not a union representative) present during questioning.

Compelled testimony cannot be used for impeachment purposes, either. "Bluntly put, there is no such thing as an impeachment exception for compelled, coerced or involuntary statements. The clarity of this proposition is beyond question. . . ." *Cooper v. Dupnik*, 963 F.2d 1220, 1250 (9th Cir. 1992).

The key inquiry for Fifth Amendment purposes is whether the statement introduced in a judicial proceeding was obtained . . . by coercion – an inquiry determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973); *Haynes v. Washington*, 373 U.S. 503, 513-14, 10 L.Ed.2d 513, 83 S.Ct. 1336 (1963), cited in *Deshawn E. v. Safir*, 156 F.3d 340 (2d Cir. 1998).

The United States Supreme Court said in *Garrity*:

> We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967).

The appellate courts that have considered the matter have concluded that the scope of *Garrity* immunity is commensurate with that of formally immunized testimony, meaning that the use restrictions applicable to immunized testimony and compelled statements are the same. *United*

States v. Veal, 153 F.3d 1233, 1240, n.7 (11th Cir. 1998) ("We can analogize between the scope of the federal use immunity statute . . . and *Garrity* analysis under the Fifth Amendment because our court has held that a *Garrity*-protected statement is tantamount to use immunity."); *United States v. Koon*, 34 F.3d 1416, 1431, n.11 (9th Cir. 1994) (noting that despite government concern about applying immunity doctrine to police officers' compelled statements, "because the use of compelled testimony in the *Garrity* context also directly implicates the individual's Fifth Amendment right against self-incrimination, *Kastigar*'s discussion of the scope of the Fifth Amendment privilege against self-incrimination is directly relevant in the *Garrity* context"), rev'd on other grounds, 518 U.S. 81 (1996).

Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding. See *Weaver*, 40 F.3d at 535; *Riley v. Dorton*, 115 F.3d 1159, 1164-65 (4th Cir. 1997); *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *Mahoney v. Kesery*, 976 F.2d 1054, 1061-62 (7th Cir. 1992); *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987).

In *Weaver*, the court held that to constitute a Fifth Amendment violation, "use of the [coerced] statement at trial is not required," but that there must be some "use or derivative use of a compelled statement at any criminal proceeding against the declarant." *Weaver*, 40 F.3d at 535.

Retired Supreme Court Justice Lewis Powell, sitting by designation in the Fourth Circuit, opined that the language in the Supreme Court's Fifth Amendment jurisprudence

suggests that the right against self-incrimination is violated by "use of the compelled statements against the maker in a criminal proceeding." *Wiley v. Doory*, 14 F.3d 993, 996 (4th Cir. 1994).

In *Kastigar, supra*, the Supreme Court held that a grant of immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect . . . " and that immunity "therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar*, 406 U.S. at 453.

There is no question that in this case McKinley's statements were compelled. Courts have held police officers' statements to be compelled if a suspect officer believes that refusal to answer questions will cause him to lose his job and if there is an objective basis for the belief rooted in official action. *United States v. Friedrick*, 842 F.2d 382, 395 (D.C. Cir. 1988) (holding objectively reasonable belief sufficient to trigger *Garrity* protection); *United States v. Camacho*, 739 F.Supp. 1504, 1515 (S.D. Fla. 1990) (adopting *Friedrick* test).

The Sixth Circuit has recently weighed in on the matter.

In *Lingler v. Fechko*, 312 F.3d 237 (6th Cir. 2002), the Sixth Circuit dealt with a problem similar to the issue in this case; several officers filed a Section 1983 action against their police chief, alleging that the chief had violated their Fifth Amendment rights when he conducted an investigation into the officers' clean-up activities that resulted in police department furniture being thrown away without authorization. The police chief recommended that the officers be suspended for 30 days, but no

punishment of any kind was imposed, and criminal proceedings were not initiated against the officers.

The Sixth Circuit affirmed a grant of summary judgment in favor of the police chief, on the grounds that the Fifth Amendment did not prohibit the act of compelling self-incriminating statements other than those used in a criminal proceeding. The Sixth Circuit stated:

> By its terms, the Fifth Amendment does not prohibit the act of compelling a self-incriminating statement other than for use in a criminal case. See *Deshawn E. v. Safir*, 156 F.3d 340, 346-47 (2d Cir. 1998) ("Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding"); *Mahoney v. Kesery*, 976 F.2d 1054, 1061-62 (7th Cir. 1992) (quoting *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989), to the effect that "the Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case . . . ").
>
> The statements given by [the plaintiffs] were not used against them in any criminal case. Indeed, under *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616 (1967), *the statements could not have been so used.* See *Garrity*, 385 U.S. at 500 (holding that the constitutional protection against coerced statements "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and . . . it extends to all, whether they are policemen or other members of our body politic").

Lingler v. Fechko, 312 F.3d at 239 (6th Cir. 2002). Emphasis added.

In *Lingler*, there was no Fifth Amendment violation because the compelled statements were not used against the plaintiffs in a criminal proceeding. But the Sixth Circuit, quoting the U.S. Supreme Court and other appellate courts, made it clear that had criminal charges been brought, any use of those compelled statements in the criminal setting would have been a violation of the officers' Fifth Amendment rights.

That is exactly what happened here. McKinley believed he was compelled to answer questions, under the written threat that if he did not, he would lose his job. His employer, the police department, in essence, forced him to waive his Fifth Amendment right to remain silent and to have an attorney present during questioning by offering him immunity from criminal sanction.

He was promised that under no circumstances would his statements be used against him. He was further promised that the Division of Police would not release the information from his interviews to any other agency without his approval and would hold it as confidential, except as mandated by an appropriate and competent authority or as necessary for disciplinary proceedings and appeals of such proceedings, which further reinforced McKinley's reasonable impression that the information from the second interview was strictly for purposes of the internal investigation.

McKinley unknowingly waived his Fifth Amendment right against self-incrimination based solely on the threat that if he didn't answer the questions, he would be terminated and the concurrent promise that he would not face criminal charges.

He was subsequently prosecuted criminally, with the Petitioners using the very *Garrity* interviews in which they had promised him criminal immunity, as evidence against him.

Garrity does not immunize someone from prosecution for lying. But *Garrity* does protect an officer from having the state *use* the contents of the actual interview as evidence against him. As the Sixth Circuit correctly stated in its opinion:

> . . . a decision by internal affairs investigators to compel the officer to make statements and admissions to the effect that he lied – which statements and admissions are then used to convict him of lying in a prior interview – amounts to a direct violation of *Garrity*. This is not a novel or ingenious interpretation of *Garrity* but rather the only way to read the opinion if we are to give meaningful effect to the Fifth Amendment. (App. at 30a.)

After discussing the U.S. Supreme Court's precedents in this area, the Sixth Circuit stated:

> . . . we conclude that McKinley alleges a classic violation of the Fifth Amendment: a decision by internal affairs officers to compel an officer suspected of specific crimes to incriminate himself as to *those* crimes, followed by the subsequent use of the incriminating statements in a trial for *those* crimes. It makes no difference that the crimes at issue in this case are falsification and obstruction, rather than assault or robbery. It similarly makes no difference, as the Supreme Court's cases make clear, that the manner of compulsion was the threat of disciplinary action and termination of employment, rather than

> physical coercion. Indeed, if McKinley reasonably believed that Defendants would impose substantial penalties on him – such as job loss or disciplinary sanctions – if he refused to answer the questions put to him in the second interview, he was compelled to incriminate himself in violation of the Fifth Amendment. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-806 (1977). On the facts before us, we cannot conclude as a matter of law that McKinley's belief that he would face severe sanctions for declining to incriminate himself was unreasonable.
>
> (App. at 32a-33a, emphasis in original.)

The Petitioners were certainly free to construct a perjury or falsification case against McKinley if they believed he lied in the first interview. They were just not free to use his own compelled speech against him in that prosecution.

As for Petitioners' argument that only Special Prosecutor Knowling is responsible for the use of McKinley's immunized second-interview statement at trial, the named defendants (or at least those in addition to Lt. Fortney who knew about the altered evidence) certainly bear some responsibility for passing the false evidence up the chain, so that Prosecutor Knowling relied upon it in making his decision to prosecute. They also bear some responsibility for placing McKinley in a position in which he was told prior to the second interview that he was suspected of a criminal offense, and yet was forced to incriminate himself during the second interview absent any of the protections against self-incrimination that the Fifth Amendment is supposed to afford. A common criminal is afforded more

constitutional protections than McKinley was afforded by his own colleagues.

In other words, Lt. Fortney and anyone else up the chain of command who knew that the second interview was to take place and that McKinley was suspected of lying in the first interview, had an obligation to offer McKinley the protections of the Fifth Amendment. Instead, McKinley's second statement was coerced under *Garrity*, while McKinley was under the false impression that his second statement would not be used against him criminally. Had he known what use the Petitioners were to make of the statement, he could have availed himself of the Fifth Amendment and refused to answer. Yet that would have cost him his job under the *Garrity* warning he was given.

As the Sixth Circuit stated:

> Officer Fortney, it is alleged, compelled McKinley to incriminate himself. Fortney took these actions pursuant to an ongoing official investigation. A special prosecutor was appointed. Fortney turned the statements over to the prosecutor and when the prosecutor introduced the statements at McKinley's trial, he did so through Fortney, who was on the witness stand. Viewing the facts in the light most favorable to McKinley, we hold that the alleged deprivation of his constitutional rights – i.e., the use at trial of incriminating statements he was compelled to make – was a "natural consequence of [Fortney's] actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961).
>
> (App. at 38a-39a.)

The Sixth Circuit further stated:

> To comport with *Garrity*, a state employer who compels an employee to make incriminating statements must not only promise not to use those statements in a criminal proceeding against the employee, but must also *keep* that promise. McKinley's claim is that Fortney and his colleagues *broke* that promise by compelling him to incriminate himself under the false promise of *Garrity* immunity and by turning the incriminating statements over to the prosecutor, who then prosecuted McKinley for the very crimes about which McKinley was compelled to make incriminating statements. As we have discussed, McKinley has offered enough evidence of this claim to proceed to trial.

(App. at 39a.)

Thus, contrary to the assertions of Petitioners, the Sixth Circuit correctly analyzed this case in connection with this Court's prior precedents and the Sixth Circuit decision requires no further review by this Court.

2. THIS IS NOT A CASE OF NATIONAL IMPORTANCE.

As to the Petitioners' argument that if the Sixth Circuit decision stands it will somehow lead to the elimination of *Garrity* interviews by municipal officials who fear the institution of civil actions, this is nonsense. As long as municipal officials keep their *Garrity* promises not to prosecute an employee criminally, they are safe from liability. As long as municipal employers afford their employees the Fifth Amendment protections envisioned by both *Miranda* and *Garrity*, they should be immune from

liability. If the Petitioners, once they realized they suspected McKinley of lying in the first interview and once they initiated a criminal investigation against McKinley for lying, had given him the right to remain silent via *Miranda*, rather than forcing him to incriminate himself via *Garrity*, there would have been no lawsuit. However, once they tricked him into incriminating himself by placing him under a *Garrity* warning, and then conducted the second interview as if it was only going to be used for internal purposes and then used it for criminal purposes, they opened themselves up for liability. It was the Petitioners' own actions, not anything done by Special Prosecutor Knowling or by the Sixth Circuit, that places the Petitioners in jeopardy. This is not a case of national importance, but rather one that should be the subject of intense self-reflection by Petitioners, and the U.S. Supreme Court need not review the matter any further.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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